

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2645

Cir. Ct. Nos. 2004CV239
2004CV363

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**JOHN NANNA, MARILYN NANNA, STEPHEN MCPARTLIN,
LOIS MCPARTLIN AND EVELYN SHERIDAN,**

PLAINTIFFS-RESPONDENTS,

v.

THE HELEN B. DALY TRUST,

DEFENDANT-APPELLANT.

**JOHN NANNA, MARILYN NANNA, STEPHEN MCPARTLIN,
LOIS MCPARTLIN AND EVELYN SHERIDAN,**

PLAINTIFFS-RESPONDENTS,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANT,

THE HELEN B. DALY TRUST,

INTERVENOR-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. The Helen B. Daly Trust, the owner of lakeshore property on Geneva Lake, appeals from an order declaring legal and enforceable a provision in a subdivision declaration that three parcels may use the pier on the Daly Trust property. The order also reverses a decision of the Department of Natural Resources denying an amended pier permit for the existing pier and remanding the permit application to the DNR for further proceedings. We affirm the circuit court's decision.

¶2 In 1986, certain property on Geneva Lake was subdivided into four parcels by certified survey map 1450. Under a DNR permit issued in 1985, a pier was constructed off lot 1, which is now owned by the Daly Trust. The other three lots, now owned by John and Marilyn Nanna, Stephen and Lois McPartlin, and Evelyn Sheridan (collectively the Nannas), did not border the lake. The subdivision declaration provides:

1. The owner of each lot shall have the right to use the common areas located on CSM #1450.
2. The owner of each lot shall have the right to the use of the pier adjacent to the property described on CSM #1450.
3. The owner of each lot shall have the right to purchase one boat slip to be installed on said pier, location of said slip to be assigned by Owner-Developer. The pier placement, size, configuration, permits and the initial cost

of pier and common area improvements to be borne by Owner-Developer and charged to each lot purchaser at time of purchase by agreement with Owner-Developer.

¶3 Between 1986 and 2003, the pier was regularly used and maintained with all lot owners sharing the expense. The pier was taken out of the water every autumn and placed back in the water every spring. Sometime in that period, the pier was made larger than that permitted by the 1985 DNR permit.¹

¶4 In October 2002, the Daly Trust applied to the DNR for amendment of the pier permit to conform to the actual dimensions of the existing pier. By the application the Daly Trust also asked the DNR to “review the effect” of the use provisions in the subdivision declaration in light of the holding in *ABKA Ltd. Partnership v. DNR*, 2002 WI 106, ¶64, 255 Wis. 2d 486, 648 N.W.2d 854, regarding the prohibition in WIS. STAT. § 30.133(1) (2003-04)² of the conveyance of riparian rights. By a February 9, 2004 decision, the DNR denied the application for an amended pier permit. Specifically, the DNR concluded that the addition to the pier required a new permit and yet because of the subdivision declaration, the Daly Trust could not apply for a permit because the pier addition was not solely for its own use as the riparian owner. The DNR found that there had been no grant

¹ The permit authorized an eighty-foot pier supported by five rock cribs. As installed in 2003, the pier was ninety-three feet in length and was constructed on eight rock cribs.

² WISCONSIN STAT. § 30.133(1), provides:

Beginning on April 9, 1994, no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

of common ownership of common areas, including the pier and that use of the pier was allowed by easement.

¶5 Aggrieved by the DNR's position that a pier permit could be issued only for the sole use of the riparian owner, the Nannas petitioned for certiorari review of the DNR's decision. The Daly Trust intervened and asserted that the subdivision declaration did not effectively entitle the Nannas to use of the pier and boat slips because such entitlement is contrary to law and that the Nannas had no vested rights in the use of the pier. The Nannas then filed an action against the Daly Trust for declaratory judgment that they have a right to unobstructed access to and use of the pier and that the Daly Trust is contractually obligated to place and maintain the pier consistent with the subdivision declaration. They also sought to enjoin any action by the Daly Trust to frustrate or defeat their use of the pier. The Daly Trust filed a counterclaim to declare the entire subdivision declaration void and unenforceable because it is permeated with illegality.

¶6 In the circuit court, the DNR conceded that it could not deny the amended permit application solely because the pier is used by nonriparian owners as well as by the riparian owner. The DNR acknowledged that the Nannas have the right to use the pier as part of the common area. The DNR asked the circuit court to determine whether the provision in the subdivision declaration allowing the Nannas to purchase a boat slip means the Nannas are co-owners of the pier or have ownership rights in their slips. It asserted that denial of the amended permit was correct if the Nannas are nonriparian owners because only riparian owners may seek and obtain a permit to place a pier.

¶7 The circuit court concluded that the subdivision declaration conveyed riparian rights to the Nannas by easement and that such conveyance

predated the restriction in WIS. STAT. § 30.133. The declaration was held to be valid and enforceable with respect to the Nannas' rights of access to and use of the common areas, including the pier. The court also held that the Daly Trust, as the sole riparian owner, is obligated under the declaration to hold and maintain a permit for the pier and place the pier for use by all the lots. The court determined that the declaration does not create an ownership interest in the Nannas and that it grants by easement access to the shoreline commons and use of the pier and related structures. Concluding that the DNR's determination was clearly erroneous, the court remanded the matter back to the DNR for further proceedings consistent with its decision. The Daly Trust appeals.

¶8 This appeal is not simply a review of an administrative agency decision. The DNR has not participated in this appeal. The enforceability of the provisions in the declaration is at issue. A question of law is presented on which we owe no deference to the DNR's decision. *See Wisconsin End-User Gas Ass'n v. PSC*, 218 Wis. 2d 558, 565, 581 N.W.2d 556 (Ct. App. 1998) (no deference is necessary when the issue is a matter of contract construction that this court is as competent as the agency to determine as a question of law). The enforceability question was determined by summary judgment. It is sufficient to note that our review is de novo and summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Aluminum Indus. Corp. v. Camelot Trails*, 194 Wis. 2d 574, 580, 535 N.W.2d 74 (Ct. App. 1995).

¶9 The first issue is whether riparian rights could be granted to the Nannas. The prohibition in WIS. STAT. § 30.133(1) does not apply because the declaration was made and recorded before the April 9, 1994 determination date in § 30.133. Prior to the enactment of § 30.133, Wisconsin followed the general rule

that riparian rights can be conveyed to nonriparian owners by easement. *See Stoesser v. Shore Drive P'ship*, 172 Wis. 2d 660, 668, 494 N.W.2d 204 (1993).³

The court held:

The rule of law in Wisconsin is that a riparian owner may grant or reserve an easement for access to a lake. The easement does not confer any ownership rights on the easement holder. However, the easement does convey an interest in the land to use the land in accordance with the terms of the easement. Riparian rights can be conveyed by easement to non-riparian owners.

Id. at 669-70.

¶10 The Daly Trust argues that the language in *Stoesser* is dicta and cannot be applied as a general rule of riparian law regarding pier rights. We do not agree. “‘Dicta’ is language which is broader than necessary to determine an issue.” *State v. Taylor*, 205 Wis. 2d 664, 670, 556 N.W.2d 779 (Ct. App. 1996). In *Stoesser* the issue was whether riparian rights could be conveyed to non-riparian landowners by easement. *Stoesser*, 172 Wis. 2d at 663. The language is no broader than the defined issue.

¶11 We conclude that *Stoesser* controls. It specifically recognizes that the grant of riparian rights⁴ is defined by the terms of the easement. *Id.* at 669-70. *See also Wendt v. Blazek*, 2001 WI App 91, ¶14, 242 Wis. 2d 722, 626 N.W.2d 78 (the real inquiry is whether the terms and purpose of the easement included the

³ WISCONSIN STAT. § 30.133 was the legislative response to *Stoesser v. Shore Drive P'ship*, 172 Wis. 2d 660, 668, 494 N.W.2d 204 (1993). *ABKA Ltd. P'ship v. DNR*, 2002 WI 106, ¶60, 255 Wis. 2d 486, 648 N.W.2d 854.

⁴ *Stoesser*, 172 Wis. 2d at 665-66 & n.2, distinguished between riparian rights and riparian ownership and defined riparian rights to include the right to construct a pier or similar structures in aid of navigation, as now conditioned by statute.

right to use and maintain the pier). Here the easement specifically grants the Nannas access to and use of the pier.⁵

¶12 The Daly Trust argues that the subdivision declaration grants riparian ownership by the provision that the Nannas have the “right to purchase one boat slip to be installed on said pier.” We reject the contention that this is a grant of ownership of the pier. Under the permit granted by the DNR in 1985, the pier had four boat slips constructed by “finger piers” constructed perpendicular to the main pier. The declaration reference is to a having a boat slip “installed” on said pier. Ownership is only of the device installed on the pier. Moreover, reading the declaration as a whole, the provision regarding the boat slip must be construed to provide each of the lot owners only the use of one boat slip. The entire declaration is focused on granting the right of use of the pier. The provision regarding the “purchase” of a boat slip requires the owner/developer to assign a boat slip location to each lot owner. A subsequent provision in the declaration allows a lot owner to lease or loan his or her boat slip only to any other lot owner. Such a restriction on the use of the boat slip is not consistent with ownership. The assigned use of a boat slip cannot be equated with riparian ownership.

¶13 Having concluded that the subdivision declaration is a valid grant of an easement of access to and use of the pier, we affirm the circuit court’s reversal of the DNR’s decision. Before the circuit court the DNR asserted that its denial of the amended pier application was proper only if there was a determination that the declaration attempted to grant riparian ownership to the Nannas. Since that is not

⁵ A permit had already been issued for the pier to which the easement applies. Any related arguments of the Daly Trust not specifically addressed are summarily rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

the case, the circuit court properly reversed the DNR's denial of the amended permit application.

¶14 The Daly Trust contends that the circuit court's finding that the pier, without the addition, is located in the place required by the existing permit is clearly erroneous. It suggests that because the pier authorized by the permit was never constructed, the permit has expired by its own terms and may be void.

¶15 It is undisputed that the pier is located within the area of the easement but not within the area shown on the pier permit application. The 1985 pier permit provides: "The permittee shall construct the facility authorized herein in strict conformance with the plans and specifications submitted to the Department of Natural Resources and *locate the structure in accordance with the provisions of agreements and deed restrictions binding upon it.*" (Emphasis added). The permit did not tie the location of the pier to the area depicted on the drawings submitted with the pier application. Instead it recognized that the location of the pier was limited by two preexisting agreements.⁶ The certified survey in the record demonstrates that the pier is located in accordance with those agreements.⁷ The circuit court's finding is not clearly erroneous.

By the Court.—Order affirmed.

⁶ The declaration was not in existence when the permit was granted.

⁷ In the statement of the case, the Daly Trust suggests that the existing location of the pier encroaches on the riparian space of the neighboring property. The point is not developed and is raised for the first time on appeal. We do not address it. See *Estrada v. State*, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999) (we need not consider arguments not developed); *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (we generally will not review an issue which is raised for the first time on appeal).

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

